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ground, because, while rates established by a State for intrastate hauls necessarily affect interstate rates indirectly, yet the extent of the burden is a matter of fact and does not necessarily render such rates unconstitutional as an interference with interstate commerce. *In re Arkansas Rate Cases* (C. C. E. D. Ark., 1911), 187 Fed. 29.

The State, in regulating rates, exercises "nothing more or less than the powers of government inherent in every sovereignty," the police power. *License Cases*, 5 How. 583, 12 L. Ed. 256. But this police power of a State "cannot obstruct * * * interstate commerce beyond the necessity of its exercise." *Railroad Co. v. Husen*, 95 U. S. 465, 473. The State may exercise such power to regulate the rates of corporations engaged in the management of public utilities. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. Such a regulation of local rates "does not interfere with interstate commerce 'as a matter of law,' yet it may do so as a matter of fact." *Shepard v. Northern Pacific Ry. Co.*, 184 Fed. 765, 797 (which is differentiated in the principal case, page 302). The court makes a distinction between *affecting* and *interfering with* interstate commerce, as a matter of fact. It admits that State rates like those in this case, *affect* interstate rates in practically every case, but do not necessarily interfere. "It is the effect * * * that determines whether or not they so substantially burden interstate commerce that they violate the commerce clause of the Constitution." *Shepard v. Northern Pacific Ry. Co.*, *supra*. This doctrine seems rather difficult of application. It throws upon the court the burden of determining whether a law comes within one class or another; the court practically must decide whether a State ought to pass such laws rather than whether it has power to pass them. It throws upon the court a function which is legislative rather than judicial. The Supreme Court has declared that every combination in restraint of trade is within the Sherman Act if, from the court's view, the restraint is unreasonable on the facts of the case. On the basis of the principal case, the same reasoning would either uphold or condemn a State statute which indirectly affects interstate commerce, according as it seems reasonable or not to the court under the facts of each case. This would seem to follow from the *Shepard* case (*supra*), where it is said that the question of whether the commerce clause is violated is "a judicial question which each court must determine upon its own responsibility on the special facts of each case." *Shepard v. Pacific Ry. Co.*, 184 Fed. 765, at p. 773. For a discussion of the *Shepard* case, see 9 MICH. L. REV. 702.

COMMERCE—NATURAL GAS AS SUBJECT OF INTERSTATE COMMERCE.—Laws of Oklahoma, 1907, Chapter 67, provided that the laying, maintaining, etc., of pipe lines shall be an additional burden on highways only to be exercised by express charter grant; that no domestic corporation shall be granted the right of eminent domain unless its charter stipulations negative all right to transport gas out of the State or to connect with or deliver to any other source transporting or furnishing gas outside the State; and that foreign corporations be denied a license to do business in Oklahoma if formed for the purpose of or engaged in the business of transporting natural gas by means of pipe lines. Complainants, foreign corporations owning the rights to the prod-

ucts of certain wells in Oklahoma, were prevented from constructing lines to transport the gas outside of the State. *Held*, that the State of Oklahoma or its officers, by the exercise or refusal to exercise any of its powers, cannot prevent owners of gas wells within the State from sending the product thereof outside the State for use, by preventing the use or construction of pipe lines across the highways of that State, where the lines were used for the interstate transportation of gas. *West, Attorney General v. Kansas Natural Gas Co., Marnet Mining Co., and A. W. Lewis*, (1911), 31 Sup. Ct. 564.

Oklahoma claimed that the State's power to exclude foreign corporations and to prescribe terms for domestic corporations, coupled with its power over its own highways, gave to the State the right to prescribe, as a condition of charters, a limitation upon the privilege of crossing highways with pipe lines. This privilege it gave only to corporations doing *no* interstate transportation. While the reasons of the State were true in themselves, they failed to take into account the fact that the result of their application was a burden upon interstate commerce. "Even though a power exerted by a State, when inherently considered, may not, in and of itself, abstractly impose a direct burden on interstate commerce, nevertheless such exertion of authority will be a direct burden on such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on." *Pullman Co. v. State of Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378. The term commerce includes practically everything relating to the subject of intercommunication. *Gibbons v. Ogden*, 9 Wheat. 1. Under this head is included transportation (*Lord v. Goodall Steamship Co.*, 102 U. S. 541, 26 L. Ed. 224), whether of passengers or of property. *Gibbons v. Ogden*, *supra*. Things of value, bought and sold are the subject of traffic. *Champion v. Ames* (Lottery case), 188 U. S. 321, 23 Sup. Ct. 321. And petroleum, gas, and such articles as are sent through pipe lines are subjects of transportation. *Columbia Conduit Co. v. Commonwealth*, 90 Pa. St. 307. The transportation of gas is therefore a part of interstate commerce. No State may discriminate against interstate commerce. *Pullman Co. v. State of Kansas*, *supra*; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; *Darnell and Son Co. v. Memphis*, 208 U. S. 113, 120-124, 28 Sup. Ct. 247, 52 L. Ed. 413. Nor may any State unreasonably burden interstate commerce. *Railroad Co. v. Husen*, 95 U. S. 465, 471, 473, 24 L. Ed. 527; *Henderson v. Mayor of New York*, 92 U. S. 259, 271-272, 23 L. Ed. 543; *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *State v. Indiana & Ohio Oil Co.*, 120 Ind. 575, 22 N. E. 778. Congress being silent or inactive relative to a subject, it is to be understood that such subject, in so far as interstate commerce is concerned, shall be free from prohibitions. *Cooley v. Wardens, etc.*, 12 How. 299; *Bowman v. Chicago, etc., Ry.*, 125 U. S. 465; *Walling v. Michigan*, 116 U. S. 446, 456; *State Freight Tax*, 15 Wall. 232, 31 L. Ed. 146. Consequently, any action by the State of Oklahoma which, while allowing the withdrawal of gas for intrastate commerce, prevents its taking for interstate purposes, is not a mere act of conservation but a taking of property without just compensation, and a substantial discrimination against interstate commerce.